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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES: QUESTION OF HUMAN RIGHTS AND STATES OF EMERGENCY

Third annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37

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*/ This document is a revised and updated version, for presentation to the Commission on Human Rights at its forty-sixth session, of the documents submitted to the Sub-Commission at its forty-first session (E/CN.4/Sub.2/1989/30 and Add.1 and Add.2/Rev.1).

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INTRODUCTION

1. In accordance with Economic and Social Council resolution 1985/37, Mr. Leandro Despouy, Special Rapporteur on States of Emergency, submitted to the Sub-Commission, at its thirty-ninth session in 1987, his first report and a list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency (E/CN.4/Sub.2/1987/19).

2. The revised and updated version of the first report (E/CN.4/Sub.2/1987/19/Rev.1 and Add.1 and 2), together with the second report (E/CN.4/Sub.2/1988/18 and Add.1), were submitted by the Special Rapporteur to the Sub-Commission at its fortieth session in 1988, under item 9 (b) of its agenda (E/CN.4/Sub.2/1988/SR.16/Add.1, paras. 10-17).

3. A revised and updated version of the second report, taking account of new, relevant and reliable information received between 8 August and 6 December 1988, was submitted to the Commission on Human Rights at its forty-fifth session (E/CN.4/Sub.2/1988/18/Rev.1). By its decision 1989/105 of 6 March 1989, the Commission approved the Sub-Commission's request to its Special Rapporteur to continue his work and to submit to the Sub-Commission, at its forty-first session in 1989, his third annual report and list, and to update that report for the forty-sixth session of the Commission in 1990. The present revised and updated version of the third report has been prepared in pursuance of that decision. The Commission further approved the Sub-Commission's request to the Secretary-General to give the Special Rapporteur all the assistance he might require in order to carry out his work.

I. METHOD AND PROCEDURE APPLIED BY THE SPECIAL RAPPORTEUR

4. At the Sub-Commission's request, the Special Rapporteur periodically solicits information from all concerned Governments, United Nations organs, specialized agencies, other intergovernmental organizations and non-governmental organizations in consultative status with the Economic and Social Council. His latest letter requesting information was dated 11 July 1989.

5. The Special Rapporteur also receives, for his consideration, reliable information from university professors, contributors of articles and associations that is sent to him care of the United Nations Centre for Human Rights at Geneva.

6. The Special Rapporteur and, at his request, the Secretariat, may contact the Government of a State concerned to obtain clarifications, for instance, on the dates of proclamation, extension or termination of a state of emergency, the dates of notifications, the impact on human rights of the measures taken, etc.

7. When information on states of emergency in force or recently proclaimed, extended or terminated is received, after verification it is summarized in the form of summary tables following the model adopted in the first two reports. These tables and clarifying remarks of the Special Rapporteur are included in the annexes to this report.

8. When information supplied by non-governmental organizations in consultative status with the Economic and Social Council alleges violations of human rights linked to emergency measures taken by a Government, it is examined in the light of any other available information and then presented in the form of a summary table accompanied by remarks. The Special Rapporteur may send a copy of such material to the Government concerned for any comments or corrections it might wish to make. Any such comments or corrections received are transmitted to the organizations concerned so that they can furnish any additional information. On the basis of the information thus collected, the Special Rapporteur may decide to publish the summary table accompanied by the remarks he deems appropriate, particularly on the possible impact of the emergency measures taken on respect for human rights, especially inviolable rights such as the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

9. This procedure was followed, in particular, in the case of the information received by the Rapporteur concerning the situation in South Africa (see annex I below). The Special Rapporteur sent the Government a summary of the information received from various non-governmental organizations in consultative status with the Economic and Social Council. This summary was prepared before the second report was submitted to the Sub-Commission in 1988, but the Special Rapporteur refrained from publishing it in that report so as to leave the Government the necessary time to formulate any comments and proposed corrections concerning the Special Rapporteur's description of the legal situation regarding the state of emergency in that country. The Government transmitted its reply in September 1988, which was unfortunately too late for distribution in time to the Sub-Commission under the item of its agenda concerning the question of human rights and states of emergency. This reply appears in annex I below, which includes a summary table of the legal situation as at 28 June 1989, together with information of non-governmental origin which has been summarized for the Government by the Special Rapporteur.

10. Should a Government take too long to reply to information of non-governmental origin transmitted to it by the Special Rapporteur in this manner, the Special Rapporteur reserves the possibility of publishing that information after verification. Thus, the Special Rapporteur very much hopes to obtain the co-operation of Governments, which are the best sources of official information.

11. Information from intergovernmental organizations and non-governmental organizations is also extremely important for giving the Special Rapporteur a realistic view of the situation, particularly concerning the impact of emergency measures on respect for human rights.

12. The Special Rapporteur is therefore grateful to the secretariat of the Inter-American Commission on Human Rights for sending him copies of the notifications received from States parties to the American Convention on Human Rights which have invoked states of emergency pursuant to article 27 of the Convention.

13. As regards non-governmental organizations, the Special Rapporteur wishes to convey particular thanks to Amnesty International, the International Association of Democratic Lawyers, the International Commission of Jurists, the International Fellowship of Reconciliation, the International Human Rights

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Law Group, the Inter-Parliamentary Union and Pax Romana for the precise information they transmitted to him. In view of the considerable amount of verification which this study involves as regards both the legal and factual situation, he sincerely hopes that he will continue to receive information from these and other concerned organizations, particularly other organizations of jurists, judges or lawyers. The Special Rapporteur also wishes to pay a deserved tribute to the press for its contribution to informing world public opinion on this subject and for the often reliable and always useful information with which it has provided him.

14. In preparing his third report, the Special Rapporteur entered a new phase of his study which required greater co-operation from the Governments concerned in that he specifically approached them when an emergency situation likely to have an impact on respect for human rights, particularly inviolable rights, was drawn to his attention on the basis of reliable information communicated by non-governmental organizations in consultative status with the Economic and Social Council or published in the press.

15. The Special Rapporteur is pleased by the favourable reception given to his requests by the Governments which he has contacted since the start of 1989. He hopes that the Governments to which he will shortly be sending a summary table and remarks concerning impact on human rights - particularly respect for inviolable rights - will provide him with additional information, especially Governments which have maintained a state of emergency in force for many years.

II. PRESENT SITUATION REGARDING STATES OF EMERGENCY

A. SITUATION SINCE 1 JANUARY 1985

16. By drawing up a list of States which have proclaimed, extended or terminated a state of emergency - a list which has appeared in his reports since August 1987 - the Special Rapporteur, within the limits of the information available to him, has endeavoured to give the Sub-Commission and the Commission as complete a picture as possible of the world situation regarding states of emergency since 1 January 1985.

17. Since November 1988, when his second updated report was issued, the Special Rapporteur has received from Governments or non-governmental organizations in consultative status with the Economic and Social Council, or else has read in the press, information concerning the proclamation, extension, maintenance or termination of a state of emergency in various States.

B. STATES OF EMERGENCY IN FORCE, PROCLAIMED OR EXTENDED SINCE NOVEMBER 1988

18. According to this information, since November 1988, some 30 States have proclaimed or extended a state of emergency, or continued to take emergency measures, in respect of all or part of the territories under their jurisdiction or control.

19. In the case of 18 of these States, the Special Rapporteur has received official information, sometimes supplemented by information from other sources, as follows:

Algeria: Letter from the Government dated 28 April 1989 on the state of siege decreed on 6 October 1988 (see also section C below, concerning terminations);

Argentina: Letter from the Government dated 6 June 1989, concerning the proclamation of a nation-wide state of siege for 30 days (see also section C below, concerning terminations);

Brunei Darussalam: Information received from the Government on 21 March 1989, and also from a non-governmental organization, concerning the extension of Emergency Orders every two years since 1962; another letter dated 18 August 1989 explaining that the state of emergency has to be extended from time to time;

Burma (Union of Myanmar): Letter from the Government dated 16 May 1989, concerning the declaration of a state of emergency at Prome on 22 July 1988 and in the Rangoon region on 3 August 1988, following public disturbances; information communicated by non-governmental organizations; information published in the press in July 1989; (see also section C below, concerning terminations);

Canada: Letter from the Government dated 24 August 1989, communicating information from the Government of Manitoba that it had declared a state of emergency throughout the province on 23 July 1989 because of major forest fires threatening the safety, health and welfare of the population; the state of emergency was ended on 4 August 1989 (according to the Emergency Measures Act, a state of emergency can be declared for a renewable period of two weeks; the measures taken dealt with the control, authorization or prohibition of travel to the region; through them some 23,000 persons were evacuated);

China: Letter from the Government dated 8 May 1989, concerning the imposition of martial law in Lhasa, Tibet, on 8 March 1989; letter from the Government, dated 15 August 1959, concerning the imposition of martial law in Beijing on 20 May 1989; information published in the press and other information received from non-governmental organizations, which will be analysed and transmitted to the Government for comments, as necessary;

Colombia: Letter from the Government dated 18 April 1989, concerning the continuation of the state of emergency in force since 10 May 1984;

Pakistan: Letters from the Government dated 24 October and 5 December 1989, giving notice of the proclamation of a state of emergency on 17 August 1988 because of the serious emergency situation threatening the security of the country as a result of external aggression and internal disturbances which the provincial government authorities were unable to control, and subsequently of its termination on 1 December 1988, because the reasons for the proclamation had ceased to exist; none of the emergency powers provided for in articles 232 and 233 of the Constitution were used by the President or by the Federal Government;

Panama: Letter from the Government dated 25 October 1989 advising that a state of emergency was last proclaimed on 10 June 1987 for a period of 19 days; the following day the Government notified the United Nations Secretary-General and the OAS Secretary-General, pursuant to article 4 of the International Covenant on Civil and Political Rights and article 27 of the American Convention on Human Rights;

Peru: Notifications of the Government to the United Nations Secretary-General dated 5 January and 4 May 1989, pursuant to article 4 of the International Covenant on Civil and Political Rights, concerning the extension of states of emergency in certain provinces; letters dated 7 March, 4 May, 2 August and 26 and 31 October 1989 referring to the extension of the state of emergency in several provinces and departments; information received from non-governmental organizations;

Singapore: Letter from the Government dated 18 August 1989, concerning administrative detentions under the Internal Security Act and the adoption of the Internal Security (Amendment) Bill of 25 January 1989;

South Africa: Information received from the Government and non-governmental organizations and published in the press (cf. annex I); further information received from the Government on 6 July 1989 (cf. E/CN.4/Sub.2/1989/45); and additional information received from non-governmental organizations which will be analysed and transmitted to the Government for comments, as necessary;

Territories occupied by Israel: United Nations reports and information received from non-governmental organizations on the emergency legislation in force; in a letter dated 14 August 1989, the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) recalled that UNRWA had been operating under de facto emergency conditions in the occupied territories and in Lebanon; the effects of those conditions on the Palestinian refugees and on the services that UNRWA could provide them were mentioned in his report to the General Assembly (A/43/13 and the report to the forty-fourth session);

Turkey: Letter from the Government dated 19 July 1988, containing a general statement; information received from a non-governmental organization in July 1988, reporting that the state of emergency was being maintained in nine provinces;

Union of Soviet Socialist Republics: The Government has transmitted the notification sent to the United Nations Secretary-General pursuant to article 4 of the International Covenant on Civil and Political Rights concerning the Karabakh;

United Kingdom of Great Britain and Northern Ireland: Letter from the Government dated 5 January 1989, transmitting a copy of the notification to the United Nations Secretary-General pursuant to article 4 of the International Covenant on Civil and Political Rights; information from a non-governmental organization; information appearing in the press and other publications;

Venezuela: Information communicated by the Government on 3 April 1989 concerning the suspension on 28 February 1989, of certain constitutional guarantees (see also section C below, concerning terminations);

Yugoslavia: Letter from the Government dated 16 May 1989 transmitting the notification sent to the United Nations Secretary-General, pursuant to article 4 of the International Covenant on Civil and Political Rights, concerning special measures in force since 10 April 1989, suspending freedom of assembly and freedom of movement between 8 p.m. and 5 a.m. in the province of Kosovo, in derogation from articles 12 and 21 of the Covenant; letter dated 15 June 1989 concerning further information on derogations from freedom of assembly; see also section C below, concerning terminations; letter dated 11 August 1989, transmitting a statement by Dr. Zelenovic, member of the Presidency of the Socialist Federal Republic of Yugoslavia, which indicated inter alia that since the political situation and the matter of security were still complex in certain places, the Presidency of the Republic considered that a number of measures introduced previously should remain in force for some time, for example the ban on assembling for the purpose of demonstrating as well as the updating of plans for the prevention and elimination of emergency conditions.

20. With regard to 12 other States, the Special Rapporteur has received from non-governmental organizations, or read in the press, information regarding which he would like to receive confirmation from the Governments concerned. Requests for information have been or will be addressed to those Governments.

21. The Special Rapporteur is aware of the possibility that the existence of a state of emergency in other countries might not have come to his knowledge and trusts that the co-operation of States and intergovernmental and non-governmental organizations in the procedure being applied will soon enable him to give a full account of the situation worldwide.

C. STATES OF EMERGENCY TERMINATED OR ENDED SINCE NOVEMBER 1988

22. The information received indicates that since November 1988, 10 States have announced the termination or ending of states of emergency or the restoration of suspended constitutional or legal freedoms. The following are the States in question:

Algeria: In a letter dated 28 April 1989, the Algerian Government informed the Special Rapporteur of the termination of the state of siege at 6 a.m. on 12 October 1988;

Argentina: In a letter dated 11 July 1989, the Argentine Government indicated that the President of the Republic had lifted the state of siege throughout the national territory;

Burma (Union of Myanmar): In a letter dated 17 August 1989, the Government indicated that the state of emergency was terminated on 24 August 1988;

Chile: In a letter dated 10 August 1989, the Chilean Government transmitted to the Special Rapporteur a copy of Supreme Decrees of the Ministry of the Interior, Nos. 1197 and 1198 of 24 August 1988, terminating the states of emergency in force at that time (the state of emergency and the state of danger of disturbance of internal peace); the Government explained that with the end of those states of emergency, the constitutional provisions concerning fundamental rights and freedoms were fully re-established; the Government added, in particular, that on 30 July 1989, 54 amendments to the Political Constitution of the State were adopted by referendum, among which were provisions amending article 41, concerning states of emergency; this revision eliminated certain powers available to the Executive as regards the declaration of a state of siege, the possibility of expelling persons from the national territory (thus ending exile as an administrative penalty) and the possibility of preventing certain persons from entering and leaving the territory, of limiting the exercise of freedom of association and freedom to form trade unions and of censoring correspondence and communications;

El Salvador: See annex I;

Fiji: In a letter dated 6 November 1989, the Government informed the Special Rapporteur that the state of public emergency, which had been in force since 14 May 1987, would be terminated on 5 December 1989; on 1 December 1989 the Special Rapporteur requested the Government to transmit additional information;

Haiti: The Haitian Government informed the Secretary-General, in a letter dated 6 March 1989, that the 1987 Constitution had been brought back into force, but according to other information communicated by the Government, about 30 articles of the Constitution remain suspended, the executive power is being exercised by the President of the military Government until the President-elect is sworn in and the legislative power is temporarily being exercised by the executive power;

Senegal: According to information communicated by the Government, on 20 May 1988, the Senegalese authorities lifted the state of emergency proclaimed in the Dakar region on 29 February 1988 as a result of acts of vandalism and looting that followed the presidential elections of 27 February 1988; according to the Government, the state of emergency only restricted freedom of movement between midnight and 5 a.m.; a state of emergency was again declared in the Dakar region on 28 April 1989 after incidents between Mauritania and Senegal, on the grounds that the physical integrity of Mauritanian nationals was obviously endangered and that they had to be placed under the protection of the forces of law and order; the state of emergency was lifted on 19 May 1989, when the situation returned to normal and the Mauritanians were repatriated; the Government asserted that in this case also, the state of emergency only restricted freedom of movement between 10 p.m. and 5 a.m. and added that it would transmit to the Special Rapporteur the texts of all provisions both introducing and terminating the two states of emergency mentioned above;

Sri Lanka: Through a notification of 13 January 1989 addressed to the United Nations Secretary-General, pursuant to article 4 of the International Covenant on Civil and Political Rights, the Government indicated that the President of Sri Lanka, in exercise of powers granted to him by law, had terminated the state of emergency through a proclamation dated 11 January 1989;

Venezuela: In a letter dated 18 April 1989, the Government indicated that it was ending the suspension of certain constitutional provisions;

Yugoslavia: In a letter dated 15 June 1989, the Government sent a copy of the notification made under article 4 of the International Covenant on Civil and Political Rights, whereby the Government informed the other States parties that it was ending the derogation affecting freedom of movement (art. 12 of the Covenant) in the province of Kosovo, with effect from 21 May 1989.

D. OTHER INFORMATION

23. The Special Rapporteur is continuing to receive information from States concerning changes in their internal law on states of emergency. Thus, on 10 August 1989, he received a letter from the Government of Portugal informing him of amendments to article 19 of the Constitution, recently revised by the National Parliament. Such information is very useful to the Special Rapporteur in his work on model legal provisions and his analysis of the development of international customary law. The Special Rapporteur has also received relevant constitutional, legislative and administrative texts from the Governments of Algeria, Brunei Darussalam, Canada, Chad, Chile, China, Colombia, Cyprus, Czechoslovakia, the Dominican Republic, Finland, Guatemala, Malta, Mauritius, Mexico, Morocco, Pakistan, the Philippines, Spain, the Union of Soviet Socialist Republics, Uruguay, Venezuela and Yemen.

24. The Special Rapporteur has received the following information:

Cuba: In a letter dated 14 September 1989, the Government indicated that no state of emergency had been proclaimed in that country since 1959;

Cyprus: In a letter dated 20 September 1989, the Government indicated that since 1 January 1985 no state of emergency had been proclaimed or extended in Cyprus, despite the foreign military occupation of part of its territory;

Czechoslovakia: In a letter dated 21 November 1989, the Government indicated that its legislation had not been amended since the response given in its previous communication of 12 December 1987;

Lebanon: In a letter dated 28 August 1989, the Government indicated that unfortunately it was not currently in a position to provide any information or comments because of the situation in the country (see also the reference in para. 19 above under "Territories occupied by Israel" to the communication from UNRWA);

Saudi Arabia: In a letter dated 25 July 1989, the Government indicated that no state of emergency had been proclaimed in that country either before or after 1985;

Yemen: In two letters dated 25 July 1989 and 25 October 1989, the Government indicated that a state of emergency had last been proclaimed in 1978 and that it had been terminated the same year;

Tunisia: In a letter dated 15 August 1989, the Government indicated that since 1 January 1985, no state of emergency had been proclaimed or terminated;

High Commissioner for Refugees: In a letter dated 10 August 1989, the United Nations High Commissioner for Refugees (UNHCR) stated that the implications of states of emergency for the enjoyment of human rights are of clear significance in the refugee context. Violations of non-derogable rights can amount to persecution in the refugee context, causing the victims to flee their countries and seek asylum as refugees. A state of emergency in a country of asylum may also negatively impinge on refugee protection where it leads to curtailment of basic rights. A refugee is often clearly in a more vulnerable position than nationals in this regard. UNHCR has the mandate of providing international protection and of seeking permanent solutions for the problem of refugees. In situations caused by states of emergency, such as those mentioned above, this mandate is evidently not easy to fulfil. For these reasons, therefore, it welcomes this initiative of the Sub-Commission which should underpin its efforts to promote and protect the rights of refugees.

Council of Europe and Organization of American States: The Special Rapporteur wishes to thank the Directorate of Human Rights and the Directorate of Legal Affairs of the Council of Europe as well as the Executive Secretary of the Inter-American Commission on Human Rights for having transmitted to him copies of notifications of derogations communicated to their Secretaries-General in accordance with article 15 of the European Convention on Human Rights and article 27 of the Inter-American Convention on Human Rights.

III. REMARKS AND OBSERVATIONS

25. The task before the Special Rapporteur is to verify the large volume of information concerning the states of emergency mentioned above. Most of this material requires a considerable amount of fact-checking and legal analysis with regard to States' responsibility in respect of their international obligations in this field and regarding compliance with all the inviolable rights (right to life, prohibition of torture, etc.) in all countries and at the highest levels of responsibility (executive powers, analysis of constitutional provisions, etc.). This work, which no organization but the United Nations is in a position to undertake, is already considerable and can only go on expanding, in view of the recent marked increase in Governments' interest in this study.

26. However, with the exception of the information on South Africa, which required two years of study, and on El Salvador, which appears in annex I, the Special Rapporteur has not been able to provide the Sub-Commission in this report, for each of the countries considered, with: (a) a detailed account of the reasons for the establishment, extension or termination of the states of emergency; (b) particulars of the rights affected by the emergency measures; and (c) an assessment of the impact of those measures on human rights. Nevertheless, he intends to do so in his reports to the Sub-Commission at its forthcoming sessions.

27. Given the increased burden on the Secretariat and the modest means made available for his study until now, the Special Rapporteur does not have all the assistance he needs to fulfil his obligations. Adequate assistance would mean, at the minimum, the availability of permanent human resources (whereas he has had only temporary assistance so far) and, if possible, an increase in such assistance, as well as data-processing equipment for his own use. To fulfil the task entrusted to him, therefore, the Special Rapporteur needs the Secretariat's full assistance, pursuant to Commission on Human Rights decision 1989/105.

IV. MODEL LEGAL PROVISIONS APPLICABLE IN EMERGENCY SITUATIONS

28. In his next report, the Special Rapporteur intends to present some model legal provisions that can serve as a reference for States so that their internal legislation on the state of emergency and its implementation will not have a negative impact on human rights and will meet the criteria of lawfulness deriving from the relevant norms of public international law.

29. To this end, the Special Rapporteur would appreciate receiving the preliminary views of the Sub-Commission and the Commission on those of the criteria set out below which they consider to be the most important.

30. With respect to states of emergency, there clearly exists an international legal framework deriving from prevailing international norms, the practice of international organizations and the internal law of States, which provides a frame of reference for the lawfulness of states of emergency. However, on the basis of the information submitted to him, the Special Rapporteur believes that this legal framework is rarely respected.

31. The Special Rapporteur is of the opinion that if, when it proclaims a state of emergency, a State satisfies the criteria of lawfulness derived from that legal framework, then the adverse consequences that the existence of that state of emergency entail for the enjoyment of human rights as a whole are necessarily limited.

32. Accordingly, the Special Rapporteur proposes the establishment of standard criteria and legal provisions (see his second report) based on the following points, which were widely developed in his previous reports:

(a) The emergency situation capable of giving rise to the proclamation of a state of emergency should be clearly defined and delimited by the Constitution, the law or jurisprudence and, regardless of the phraseology employed, the existence of a real and imminent public danger should be clearly specified;

(b) It is essential that the de facto situation exhibiting these characteristics should be publicly announced and also reflected in the legal form of the state of emergency, in order to ensure that the population is informed of the restrictions imposed on its rights and freedoms;

(c) The emergency measures taken should be commensurate with the emergency situation for which they are intended;

(d) The part of the territory in which the emergency measures are to be applied should also be commensurate with the geographical extent of the emergency situation and should be officially specified;

(e) Domestic legislation should clearly specify which rights permit of derogation and which rights do not permit of derogation and must be respected in all circumstances; the Special Rapporteur proposes to draw up a list of those inviolable rights on the basis of the various international and regional instruments and international customary law concerning human rights, in order to provide States with a form of guideline to which they can refer;

(f) In all cases, there should be a monitoring mechanism, which could be either parliamentary, upon the proclamation or extension of a state of emergency, or judicial, for the assessment of measures taken against individuals;

(g) By providing for the legal liability of the State, it would be possible to compensate persons who have suffered under emergency measures. This would serve to prevent misuse of the measures.

33. The Special Rapporteur believes that, in order to minimize the adverse effects of the existence of a state of emergency on the enjoyment of human rights, it is particularly important that States should endeavour:

(a) To avoid both a legal vacuum and conflicting legislation;

(b) To maintain the powers of the non-military courts and limit the competence of military courts to military crimes and offences;

(c) To maintain the procedural guarantees: in particular, habeas corpus, amparo and other remedies having the same purpose should in no circumstances be suspended;

(d) To avoid any de facto state of emergency (i.e. a situation in which emergency measures are taken without an official proclamation or in which, after a state of emergency has been officially repealed, exceptional measures are nevertheless maintained). De facto states of emergency, like the adoption of excessive measures during an emergency situation, have an extremely adverse effect, not only on the country s internal legal order but also in respect of the most fundamental human rights. Note should also be taken of another serious problem, which the Special Rapporteur proposes to analyse in depth, that exists in some countries, where persons can be arrested and detained, sometimes for very long periods, without a state of emergency having been proclaimed.

34. The establishment of standard legal provisions as a guideline is thus one way of encouraging States to respect human rights and fulfilling the mandate entrusted to the Special Rapporteur by the Commission on Human Rights, under which he is to propose to the Sub-Commission, for transmittal to the Commission, measures designed to ensure respect throughout the world of human rights and fundamental freedoms in situations where states of siege or emergency exist, especially of those rights referred to in article 4 (2) of the International Covenant on Civil and Political Rights, namely the inviolable rights not permitting of derogation in any circumstances whatsoever.

Annex I

I. SUMMARY TABLES BY STATES

A. South Africa

SOUTH AFRICA 1/

PROCLAMATION, EXTENSION OR TERMINATION	DATES	DURATION	TERRITORY	GROUNDS	MEASURES TAKEN	RIGHTS CONCERNED
Proclamation of state of emergency	21.7.85		In 36 districts representing 14 per cent of all districts	Circumstances seriously endangering public safety and order, which cannot be adequately upheld by ordinary laws (statements by the President in Parliament and to the press)		
Termination	7.3.86		Ibid.			
"Proclamation" R.108	11.6.86	From 12.6.86	Entire territory			
"Proclamation" R.95 ("Regulations under Public Safety Act of 1953")	10.6.87	From 11.6.87	Ibid.	Ibid.	Powers of arrest and detention vested in the security forces (R.96) Restrictions imposed on reporting by press and audio-visual media (R.97) Powers of control over pupils and over the situation in the schools vested in the Director of Education (R.98)	
Extension of state of emergency	9.6.88	From 10.6.88	Ibid.	Ibid.		
Extension of state of emergency	8.6.89	From 9.6.89	Ibid.	Ibid.		

1/ This table contains the information that the Special Rapporteur has been able to verify as at 28 June 1989. Some of it has already appeared in the updated version of his first report, prepared for the Commission on Human Rights (E/CN.4/Sub.2/1987/19/Rev.1, annex I), which was essentially based on reliable information received by the Special Rapporteur from the following non-governmental organizations in consultative status with the Economic and Social Council: Amnesty International, International Commission of Jurists, International Confederation of Free Trade Unions, International Federation of Human Rights, International Defence and Aid Fund for Southern Africa and Rädda Barnen (in particular, a

study by Nicholas Haysom, Centre for Applied Legal Studies, University of Witwatersrand, The State of Emergency Law with Special Reference to the Detention of Children, presented at the International Conference on Children, Repression and the Law in South Africa, Harare, 24-27 September 1987, and South Africa, Human Rights and the Rule of Law, published by the International Commission of Jurists, Frances Pinter Ltd., London). This information was communicated to the Government by the Special Rapporteur on 28 July 1988, for any comments or corrections that the Government might wish to make. In his updated second report to the Commission, the Special Rapporteur informed the Commission of his action and of the fact that, according to information appearing in the press, the state of emergency had been extended by the Government on 11 June 1988 (E/CN.4/Sub.2/1988/18/Rev.1, para. 23); see also four relevant publications received by the Special Rapporteur, to which reference is made in annex III of the same document. On 1 September 1988, the Government transmitted to the Chairman of the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its fortieth session a reply to the information communicated by the non-governmental organizations mentioned above and requested that its reply should be circulated as a Sub-Commission document. That was not possible due to lack of time. At the suggestion of the Special Rapporteur, therefore, the Government agreed to have its reply published as an annex to the third report. It is reproduced below, with a few comments drawn from information supplied by the same non-governmental organizations, which the Special Rapporteur has also communicated to the Government. The table has been corrected to take the Government's reply into account. The comments of the non-governmental organizations and the Government's reply are reproduced unchanged. The Government's reply has been communicated to the organizations for comments and clarifications. As at 28 June 1989, the Special Rapporteur had received no replies from those organizations. He therefore decided to provide the Sub-Commission with all the information above and below. He will communicate any further reliable information to both the Government and the Sub-Commission.

COMMENTS

Proclamations, extensions and terminations

The Public Safety Act of 1953: authorizes the President to declare a state of emergency in all or part of the territory (the proclamation cannot be legally challenged; if the state of emergency has not already been lifted, it expires after 12 months) and to terminate it; gives him the power to legislate, when it deems necessary for the maintenance of public safety or order, through regulations which must be submitted to Parliament within 14 days following their promulgation; enables him to delegate his powers in this area to subordinates through orders or rules. Before 1985, these emergency powers had only been used once, after the events at Sharpeville in 1960.

The Public Safety Amendment Act of 1986 makes the President's obligation to proclaim a state of emergency redundant by authorizing the Minister of Law and Order to declare any area or the entire country to be an unrest area and to apply any regulation he deems necessary to that area. The Minister's declaration expires after three months, but it is renewable indefinitely with the President's authorization.

Successive proclamations of states of emergency took place in 1985, 1986, 1987 (see E/CN.4/Sub.2/1987/19/Rev.1, annex I) and 1988. Since it has not acceded to the International Covenant on Civil and Political Rights, South Africa has no obligation to notify the Secretary-General of the United Nations.

Measures taken and rights concerned

Under the delegation of powers provided by the Act of 1953, police chiefs have been able to decide: to prohibit funerals, religious gatherings, the wearing of buttons or clothing, the possession of tyres and entry into or exit from residential neighbourhoods; to impose curfews; to prevent trade-union meetings; to order or prohibit the attendance of children at schools or other institutions. Policemen have therefore governed entire regions, in particular the black townships.

The powers vested in the Government under the "security" laws concerning public gatherings, freedom of movement, prisons, the defence forces, censorship and freedom of the press, provide it with various legal means of controlling any dissidence; these means resemble emergency powers in every way except in name. The emergency measures taken under these powers are designed in particular to exclude all judicial control over their implementation, particularly over measures taken by the police. During declared states of emergency, the President has promulgated regulations along these lines: Regulation 16 (1), which aims at absolving the security forces of responsibility by requiring the plaintiff wishing to challenge an illegal act on their part to prove that the act complained of was not committed in good faith; Regulation 16 (3), or the Ouster Clause, which is designed to exclude any control by the Supreme Court over the emergency powers, regulations, orders or behaviour of the security forces; and Regulation 3 (10), designed to restrict detainees' access to their lawyers.

The measures adopted under the state of emergency declared in 1986 provided, in particular, for the detention of suspects for up to 14 days. On 11 June 1987 the Government adopted a series of "Proclamations" which, inter alia, extended the powers of the security forces in regard to arrest without a warrant (particularly those of the members of the South African Defence Force and other bodies grouped under the name "security forces"), the use of force, detention and the interrogation of suspects. Under these emergency measures, the duration of detention was increased to 30 days, renewable upon the decision of the Cabinet Minister. New regulations on detention were adopted in Proclamation R.106 of 26 June 1987, following an appeal to the Supreme Court of Durban challenging the regulations decreed by the Minister of Justice.

Another objective of the regulations is to prevent the media from reporting on the behaviour of the police or informing the public about conditions of detention, subject to heavy fines or seizure in the case of local publications, or to expulsion in the case of foreign journalists, unless the information quoted comes from the Government Bureau of Information. Regulation 123 of 1987 authorizes the Minister, when he feels that a periodical, by systematically publishing "subversive propaganda" (in favour of revolution, uprisings, boycotts, strikes, etc.), endangers public safety or the maintenance of public order, or might delay the lifting of the state of emergency, to issue it a warning, followed if necessary by a ban on its publication, during a period not to exceed three months, unless publication has been approved by a person to be designated by him.

Various court decisions have annulled detentions ordered under the regulations (see cases Nos. 1074/86, 4988/86, 399/87 and 1167/87) or required grounds for the detention to be presented. Numerous cases have been brought before the Supreme Court and the Appellate Division. The judges held that, despite the Ouster Clause, it was for the judge to determine the validity of the Regulations (Radebe v. Minister of Law and Order, 7 July 1986, Goldstone J.). However, the Appellate Division decided that under the 1953 Act, the President could adopt regulations depriving individuals of fundamental rights recognized by common law, such as the right to be heard when detention exceeds 14 days and the right to see one's legal representative or lawyer. Thus, these fundamental rights do not override Regulation 3 (1), which prohibits anyone from entering into contact with persons detained under the emergency measures unless authorized to do so by the Minister of Law and Order.

Impact on human rights

(a) Right to life

More than 200 children are alleged to have been killed by the security forces. On 22 April 1987, seven striking workers were killed by the police. In August 1987, 10 miners who were trade-union members were killed during confrontations with the police during a strike.

(b) Prohibition of torture

Torture and inhuman treatment are alleged to have been inflicted on children.

Forty-three persons have alleged the use of systematic and intensive torture by the police on hundreds of detainees at Port Elizabeth and at Uitenhage.

Numerous trade unionists arrested under the emergency powers have reported being subjected to brutality and torture.

(c) Other human rights

(Right to be brought promptly before a judge, art. 9 of the International Covenant on Civil and Political Rights; right to leave one's country and return to it, art. 12; right to be tried without undue delay, art. 14; freedom of assembly, art. 21; freedom of association, art. 22)

A "security law", the Internal Security Act, prohibited for nearly 10 years any meeting of more than two persons in the street, and authorized unlimited detention without trial, access to a lawyer or family visits; other legal provisions make it possible to ban books, persons and organizations. Under Regulation 23 of 1988, the Minister may without warning or prior hearing decide to prohibit an organization (association or group of persons) or a person from conducting any activity, or a specific activity or type of activity.

From 25,000 to 30,000 persons are thought to have been detained for periods of more than 30 days between June 1986 and August 1987, of whom 40 per cent were children under 18 years of age and 554 were trade unionists. Since the Minister of Law and Order may renew the detention order indefinitely, some of these persons were still being detained without charge or trial at the end of 1987, including 322 who were trade unionists. The Internal Security Amendment Act authorizes detention without trial for up to 180 days.

Following the increase in the number of trade-union demonstrations, the Government, through Order 334 of 1988, prohibited 17 of the most important anti-apartheid and civil-rights defence movements from engaging in activity or act.

The passports of certain trade unionists were taken away from them in order to prevent them from participating in international meetings. The police intervened during strikes and carried out arrests and mass deportations in 1987 and early 1988. During the strike of August 1987, more than 250 miners were seriously wounded, more than 200 were arrested and detained and 46,000 were dismissed from their jobs.

II. REPLY OF THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA */

[Original: English]
[1 September 1988]

Comments on the document of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities

Most countries in the world provide for extraordinary powers in order to cope with dangers to the public which cannot be met with the ordinary law of a country. This fact is stressed also in British constitutional law and expressed as follows by Jones, Constitutional and Administrative Law (1968):

> "It is the duty of any government to maintain law and order and in Britain this is achieved, traditionally, with the maximum of freedom for the individual. However, the normal life of the nation may be imperilled by external threat of invasion or by a natural catastrophe or by internal dissension. In such event the ordinary powers of government are insufficient to allow that degree of promptitude and improvisation necessary to ensure 'business as usual'. Totalitarian States do not need exceptional powers in times of crisis - their normal powers suffice for any situation, but free societies do need to give their governments wide powers with which to meet dangerous circumstances."

For the purposes stated above, legislation in France, Belgium and Argentina provides for a "state of siege", in Italy and the Netherlands for a "state of war", in the Federal Republic of Germany for a "state of defence".

The Public Safety Act, 1953 (Act 3 of 1953), provides for the declaration of a state of emergency in South Africa. This Act was modelled upon the English Defence of the Realm Act 1914, the Emergency Powers Act 1920, and the Emergency Powers (Defence) Act 1939. The Public Safety Act, 1953, thus does not contain novel material, but is similar to acts in other countries, making provisions in the event of emergencies. The Act does not give limitless power to the State President. As is clearly stated in Section 2 of the Act, a state of emergency may only be declared to exist when:

(a) any action or threatened action by any persons or body in the Republic or any area within the Republic is of such a nature and of such an extent that the safety of the public, or the maintenance of public order is seriously threatened thereby; or

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*/ By a letter of 1 September 1988, the Permanent Mission of the Republic of South Africa, referring to the letter of 28 July 1988 sent by the Special Rapporteur concerning states of emergency, and in response to the request contained in that letter, submitted the following comments to the Chairman of the fortieth session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The comments were accompanied by a request that they be circulated as an official document of the session. Due to the time limitations of the Sub-Commission and late receipt of the comments, publication was impossible. Upon the proposal of the Special Rapporteur, the Government of the Republic of South Africa agreed that its reply be reproduced in an annex to the third report of the Special Rapporteur.

(b) circumstances have arisen in the Republic or any area within the Republic which seriously threaten the safety of the public, or the maintenance of public order; and

(c) the ordinary law of the land is inadequate to enable the Government to ensure the safety of the public, or to maintain public order.

In terms of Section 3 of the Act, the State President may only make such regulations as appear to him to be necessary or expedient for providing for the safety of the public or the maintenance of public order, and for making adequate provision for terminating such emergency, or for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of such emergency.

Regarding the manner in which the State President has to exercise his powers in terms of the Public Safety Act, 1953, in respect of the making of emergency regulations, the Appellate Division of the Supreme Court of South Africa stated that, although the State President has a wide discretion in this regard, "this does not mean, of course, that the exercise by the State President of the powers conferred upon him by the Act is immune from attack. It need hardly be said that he must apply his mind to whatever matter may be in issue, that he must act bona fide and that he must exercise the powers conferred on him by Section 3 (1) (a) of the Act for the purposes mentioned in the section" (Omar, Fani, Bill case 1987 (3), SA 859 (AD)).

Regarding the statement that successive "proclamations of states of emergency have taken place in 1985, 1986, 1987 ... and 1988", it should be pointed out that on 21 July 1985 a state of emergency was declared to exist in 36 magisterial districts only (i.e. approximately 14 per cent of all such districts) in South Africa. It lasted until 7 March 1986, when the proclamation concerned was withdrawn. A country-wide state of emergency was declared to exist as from 12 June 1986, and again as from 11 June 1987 and 10 June 1988. These states of emergency were declared because of prevailing circumstances arising from an onslaught on the Republic of South Africa which assumed such proportions that the State President was of the opinion that the ordinary law of the land was inadequate to enable the Government to ensure the safety of the public and to maintain public order. As for the background against which acts of violence and unrest were planned and launched, reference can be made to the State President's statements in press releases (1985 and 1988) and in Parliament (1986 and 1987).

The allegation that the proclamation of a state of emergency cannot be legally challenged does not reflect the true position. Although an ouster clause is contained in Section 5 B of the Public Safety Act, 1953, it should however be kept in mind that the ouster provided for in Section 5 B relates to the validity of proclamations and regulations which may be issued in terms of the said Act, and not to actions taken in terms of such regulation.

According to recent decisions (inter alia a decision of the Appellate Division), ouster clauses (such as Section 5 (B)) cannot oust the inherent jurisdiction of the courts to inquire into the validity of actions on common law grounds such as mala fides. Judge Leon, in the Hurley case (confirmed on appeal) stated that: "It is an uncontrovertible, but often neglected fact, that the Supreme Court of South Africa will exercise its inherent power of

judicial review in regard to exercise of jurisdiction and/or mala fides on the part of an administrative authority or other statutory body, notwithstanding legislative ousting of its jurisdiction."

It should also be pointed out that, despite the provisions of Section 5 B, which reads as follows: "No interdict or other process shall issue for the staying or setting aside of any proclamation issued by the State President under Section 2, any regulation made under Section 3, any notice issued by the Minister under Section 4 or 5 A (1) or (2) or any regulation made under Section 5 A (4), and no court shall be competent to inquire into or give judgement on the validity of any such proclamation, notice or regulation", the Court, in the case of Metal and Allied Workers Union v. State President 1986 (4), SA 358 D and CLD, found that a certain emergency regulation was ultra vires the powers of the State President. The Court argued that, if any regulation was void for uncertainty it was ultra vires and to that extent not made under the relevant section of the Act. Section 5 B therefore does not preclude a court from inquiring into the validity of emergency regulations. Regarding the indemnity clause or ouster (Regulation 16 (3) of the emergency regulations published in the Government Gazette of 12 June 1986 and applicable to similar provisions in the other sets of emergency regulations of 1985, 1987 and 1988, the Court stated in Radebe v. Minister of Law and Order 1987 (1), 586 WLD: "The effect of the emergency regulations promulgated in terms of Section 3 (1) (a) of the Public Safety Act of 1953, i.e. the ouster clause, is that the Court is entitled, and indeed is obliged to inquire whether any order, rule or notice in question was issued lawfully under the regulations. If it was, then and only then will the ouster clause become effective. If it was not, then the ouster clause will not operate in respect of that conduct. In other words, such a provision cannot prohibit the Court from inquiring whether the conduct in question was lawful or unlawful. It is desirable that if members of 'a force' act beyond their powers under the emergency regulations, or if they do not use them in a legitimate and bona fide manner, they should be brought to account by the Court. They should be made aware of the nature and limits of their powers, and they should know that, if they abuse them or use them unlawfully, they may be summoned before the ordinary courts of the land to explain and answer for their actions." Emergency regulations were in fact "amended" by the Court in instances where subdelegation of powers was empowered in the case of UDF v. State President (case No. 16433/86 (WLD)) and UDF v. State President (case No. 1075/86 (unreported)).

The following should be stressed regarding the Public Safety Amendment Act, 1986 (Act 67 of 1986), namely, that it was promulgated after the 1985 state of emergency was lifted in March 1986. The Act was intended to provide for an emergency of the extent experienced at that time, and in that sense the provisions of the Amendment Act could be used instead of declaring a state of emergency. The security situation, however, thereafter deteriorated to such an extent that the State President deemed it necessary to declare a country-wide state of emergency. The provisions of the 1986 Amendment Act have thus never been used since its acceptance and no area has been declared to be an unrest area.

It is mentioned in the document that the "security laws" confer upon the Government various means of controlling all dissent. This is simply not true. In the case of S v. Looij 1975 (4), 705 (Rhodesian Appellate Division

and applicable in South Africa), it was clearly pointed out that: "No matter how scurrilous, defamatory or grossly offensive a written or verbal attack on a Government may be, such an attack is not subversive unless it is an attack on the system of government as distinct from the government operating for the time being under the system. The right of a member of the public to criticize, even in scathing terms, the action of Government elected for the time being under a democratic constitution is one of the corner-stones of democracy."

The media emergency regulations should be seen against the above guidelines provided by the Court.

The allegation that the emergency measures taken under the "security laws" are emergency powers in everything but name, needs to be clarified. The Internal Security Act, 1982 (Act 74 of 1982), does provide for measures that could be taken regarding persons, publications, meetings and organizations. These measures, however, differ from the emergency measures in material respects, in that the Internal Security Act, 1982, provides for various matters such as a board of review, advisory committees, inspectors of detainees, etc. which are not provided for in the emergency regulations. Under this Act, the jurisdiction of the courts is in no way excluded, except regarding detention for interrogation in terms of Section 29 of the Internal Security Act, 1982. The view of the courts regarding ouster clauses is explained above and is particularly applicable to the ouster clause contained in Section 29 of the Internal Security Act, 1982.

Regarding the allegation that the "emergency measures are designed to exclude all judicial control over their implementation", it is pointed out that the indemnity provided for in the emergency regulations is not applicable to any act done in good faith. It is only applicable where an act is performed in good faith:

- by the official concerned;

- in the carrying out of his duties, or the exercise of his powers or the performance of his functions in terms of the relevant regulations;

- with the intent to ensure the safety of the public, the maintenance of public order or the termination of the state of emergency.

The Rabie Commission of Inquiry into Security Legislation discussed the aspect of indemnity and in paragraph 8.8.5 of the report of the Commission it is stated:

> "... The standpoint that, in given circumstances, delictual or criminal liability is limited to cases where the action was not taken in good faith is not new, as is evident from the first three of the Acts referred to above (i.e. the Indemnity and Undesirables Special Deportation Act, 1914; the Indemnity and Special Tribunals Act, 1915, and the Indemnity and Trial of Offenders Act, 1922). Nor is this view confined to South Africa ... . In a recent (1976) (United States of America) report of the National Advisory Committee on Criminal Justice Standards and Goals, entitled 'Disorders and Terrorism', the view is expressed that it is in the interests of society that the individual who in times of

disorder or terrorism has to act to restore order should know that he will not be liable if he errs in good faith, perhaps using more force than was necessary. To quote (p. 100 of the report):

> 'Kenneth Culp Davis has written: "The public interest suffers when an officer resolves doubts in favour of inaction because he may be personally liable if he takes action" (An approach to Legal Control of the Police, Texas Law Review, vol. 52, 1974, pp. 703-725, at p. 720). If this were to occur in a situation involving disorder or terrorism, the results for society could be disastrous. The officer entrusted with the response capability is entitled to know not only what he ought to do under given circumstances, but also that, if he makes a good faith error resulting in an excessive use of his powers, he will not be personally liable for the consequences, either civilly or criminally.'"

The Rabie Commission (para. 8.8.6) pointed out that the reason usually advanced for the restriction of liability to cases where the action has not been taken in good faith is essentially the same as that contained in the paragraph immediately above. The point is that, when action is needed to suppress disorders, circumstances are then such that there is not time to reflect "whether one might not be acting over-hastily or using more force than is actually necessary in taking this or that action, and, further, that failure to act at the moment when action is needed may be to the detriment of society".

The Rabie Commission (para. 8.8.6) also considered the question whether it is fair that the onus be placed on the plaintiff to prove that the act was not committed in good faith. The Commission came to the conclusion that there are two sides of the matter: it may be extremely prejudicial to a plaintiff, but in certain circumstances it may be impossible for the State to prove that the person concerned was acting in good faith, and that "one can hardly say more than that in each case cognizance should be taken of all the relevant facts of the occurrences in question and that, in the light thereof, the interests of society, on the one hand, and those of the individual who suffered loss in the occurrences, on the other hand, should be weighed up in a fair and realistic manner".

In the present state of emergency it was considered necessary that the indemnity clause again be incorporated in the emergency regulations and that the onus be placed on the plaintiff to prove that the act complained of was not done in good faith.

The allegation that emergency measures are designed to exclude all judicial control over their implementation is contradicted by the numerous reported cases instituted by persons affected by the emergency regulations. There are also numerous substantiated cases.

Regarding access by lawyers to detainees under the emergency regulations, it should be stressed that a lawyer can have such access with the consent of the Minister of Law and Order or the Commissioner of the South African Police. Such permission cannot easily be refused. It was stated in the case of Mandela v. Minister of Prisons 1983 (1), SA 938 (A), by the Appellate Division that: "The right of access to one's legal adviser, as a corollary of

the right of access to the Courts, is a fundamental common law right." This was also quoted in Metal and Allied Workers Union v. State President 1986 (4), SA 358 (D + CLD). In fact, permission has never yet been refused. In any event it can only be refused on grounds relating to the safety of the public, the maintenance of law and order and for making adequate provision for terminating such emergency or for dealing with any circumstances which have arisen or are likely to arise as a result of such an emergency.

Access of lawyers to detainees is restricted also in the case of detention in terms of Section 29 of the Internal Security Act, 1982. It must, however, be kept in mind that Section 29 provides for the detention of suspected terrorists. The Rabie Commission (para. 10.49) remarked in this regard:

> "Such contact (e.g. by a legal adviser), it was argued before us, could be conducive to the continuation and promotion of the activities of the organization of which the detainee is a member ... Such information (if transferred by a visitor to the detainee) could give the organization the opportunity to replan its activities and could serve as a warning to the detainee's fellow infiltrators, or local contacts, to go underground or take flight ... In the second place, it was argued before the Commission, the danger existed that a legal representative ... in spite of what the code of ethics of his profession requires of him, abuses the contact he is allowed with a detainee to convey messages from or to the detainee. The attention of the Commission was directed to the fact that the problem just mentioned was not confined to South Africa." (The problem was experienced in the Federal Republic of Germany, in particular with trials of members of the so-called Bader-Meinhoff gang and led to special legislation ... In 1978, the Kontaksperrengezetz was passed, in terms of which any contact between a detainee and, inter alia, his legal representative, could be temporarily suspended in certain circumstances.)

The Commission referred to cases where lawyers had played or were still playing an important role in the continuation of subversive activities against South Africa.

Regarding the allegation of "unlimited detention" in terms of the Internal Security Act, 1982, it should be pointed out that, since 1986 up to date, no person has been detained under the relevant provision (Section 28 of the Act). (Section 28 provides for the detention of certain persons in order to prevent the commission of serious offences such as terrorism, subversion, sabotage, etc.)

Regarding the statistics provided under the heading "Right to life", the following should be pointed out:

During the period 12 June 1986 until 31 June 1988, 23 children under the age of 18 years were killed during security force action. However, during the same period 163 children under 18 years were killed by rioters. In many instances, children under 18 years were involved in and responsible for so-called necklace murders, arson, etc.

The incident on 22 April 1987 occurred during the South African Railways and Harbour Workers Union strike, where three persons were killed when members of the South African Police were attacked at the Doornfontein Station and had to act in self-defence. Similarly, three persons were killed on the East Rand

and one wounded. No record of evidence exists regarding an incident where 10 trade-union miners were killed and 250 wounded (as alleged) during August 1987. It can categorically be stated that the South African Security Forces were not involved in such an incident.

The statistics of 25,000 to 30,000 people being detained and the percentage of children detained for the specified period are incorrect. In terms of Section 3 (4) of the Public Safety Act, 1953, the names of people detained under emergency regulations for a period longer than 30 days must be and are regularly laid upon the Table in Parliament. Regarding the statistics in respect of trade-union members, it should be pointed out that no person has been arrested for being a trade-union member. Arrests are only performed when a person's actions are to the detriment of public safety, etc. It is therefore not necessary, and statistics are accordingly not kept, to show how many trade unionists or any other category of persons were detained.

Regarding the allegations of torture and inhuman and degrading treatment of detainees by members of the Security Forces, the vague manner in which the allegations are made are indicative of the propagandistic nature of the allegations. No particular facts or specific events are mentioned to substantiate these claims.

Various factors show the improbability of the truth of the allegations made. Section 5 of the Police Act, 1985 (Act 7 of 1958), imposes a statutory duty on the South African Police fully to investigate any allegation of crime including the alleged torture and assault of detainees. Various Ministers as well as the Commissioner of the South African Police have on numerous occasions publicly delared that no improper conduct of members of the Security Forces towards detainees would be tolerated and that any allegation of maltreatment would be investigated and that members involved would be criminally prosecuted. Instances of individual members of the Security Forces who had made themselves guilty of such transgressions of the law and who have accordingly been criminally prosecuted and sentenced in courts of law, are on record.

Furthermore, emergency detainees, in cases where they are of the opinion that unlawful conduct has been instigated against them, have free access to their lawyers as well as to the independent Courts of the Republic of South Africa. Court applications to prohibit members of the Security Forces to launch alleged unlawful acts against detainees is proof thereof.

Various control measures to prevent maltreatment of detainees are also contained in the emergency regulations themselves. According to the regulations, a detainee shall inter alia, be medically examined by a medical doctor as soon as may be practicable after his arrest and detention, and as shortly as possible before his release from detention. Furthermore, the head of a prison must ensure that any medical or dental treatment prescribed by the doctor for a detainee is carried out promptly. No detainee may, without the consent of the Commissioner of Police, be detained in a police cell or locked up for a continuous period in excess of 14 days.

Detainees are also frequently visited by a judge of the Supreme Court of South Africa. The visits by judges are not prearranged and detainees can make complaints to them in confidence.

Reference is also made in the Rapporteur's document to detention for 180 days under the Internal Security Amendment Act, 1986 (Act 66 of 1986) (Section 50A). This Section only comes into operation once the State President puts it into operation by notice in the Gazette, and its operation may likewise be suspended. Since the enactment of this Section up to date, the State President has not once put it into operation and no person has consequently been detained in terms of that Section.

It may be added that the South African Courts are well aware of their duty in respect of civil rights. It was stated in the case of Bloem v. State President of the RSA 1986 (4), 1064 (OPD): "The dissenting speech of Lord Atkin in the House of Lords in Liversidge v. Anderson (1941) 3 ALL, ER 338, in which he said that '(it) has always been one of the pillars of freedom, one of the principles of liberty for which, on recent authority, we are now fighting, that the judges are no respecters of persons, and stand between the subject and any encroachment on his liberty by the executive, alert to see that any coercive action is justified in law', has found favour, not only in a recent decision of the House of Lords in England, but also in decisions of South African Courts. The leading case in this respect is the Appeal Case of Minister of Law and Order v. Hurley 1986 (3), SA 568 (AD)."

Annex

The Government of the Republic of South Africa included several annexed documents, including press releases and official statements announcing the proclamation of the states of emergency of 1985, 1987 and 1988, relevant issues of the official Government Gazette, and relevant excerpts from the Statutes of South Africa. Copies of these documents, as listed below, are available in the files of the Secretariat:

- 1985 Press Release by State President P.W. Botha on the Proclamation of a State of Emergency in Various Magisterial Districts in the Republic of South Africa.

- Statement by State President P.W. Botha in Parliament, 10 June 1987.

- 10 June 1988 Press statement by State President P.W. Botha on the State of Emergency.

- Proclamation by the State President of the Republic of South Africa of Regulations under the Public Safety Act, 1953. (No. R. 106, 1987.)

- General provisions of chapter IX of the Statutes of the Republic of South Africa, Prisons and Reformatories (Prison Act, No. 8 of 1959, sections 81-87); chapter III, Special regulations for different classes of prisoners, and chapter VIII, Detention and treatment of certain other classes of prisoners.

In a letter to the Secretariat dated 6 July 1989, the Permanent Representative of the Republic of South Africa to the United Nations Office at Geneva transmitted the text of the regulations regarding the extension of the state of emergency in South Africa published in the Government Gazette, as well as the text of the press statement made by State President P.W. Botha and a copy of the explanations given by Mr. van der Merwe, Minister of Information.

At the request of the Permanent Representative, these documents were brought to the Special Rapporteur's attention and the text of the State President's statement has been circulated as a Sub-Commission document under item 9 (b) of the agenda for its forty-first session (E/CN.4/Sub.2/1989/45).

B. El Salvador

EL SALVADOR

PROCLAMATION, EXTENSION OR TERMINATION	DATES	DURATION	TERRITORY	GROUNDS	MEASURES TAKEN	RIGHTS CONCERNED
Suspension of constitutional guarantees	6.3.80	30 days renewable	Entire territory	Political and social crisis and climate of general violence	Suspension of freedoms of movement and association, expression, inviolability of correspondence	Derogations from arts. 12, 17 and 19 of the Covenant
Legislative Decree No. 50	24.2.84	1 year			Decree regulating attacks on the integrity and security of the State in the event of suspension of constitutional guarantees. Permits, inter alia, administrative detention for a period of 15 days, including 8 days of detention incommunicado	
Decree No. 97	17.5.84	30 days	Idem	Termination of temporary easing of restrictions on party political activity	Derogation from arts. 12, 17, 19, 21 (freedom of assembly except meetings of a religious, cultural, economic and sporting nature), 22 (freedom of association with others, except for the right to form and join trade unions)	
Extension of martial law (Legislative Decree No. 322)	18.1.85	Idem	Idem		Derogation from arts. 12, 17, and 19, para. 2 (freedom of expression)	

PROCLAMATION, EXTENSION OR TERMINATION	DATES	DURATION	TERRITORY	GROUNDS	MEASURES TAKEN	RIGHTS CONCERNED
Ibid (Legislative Decree No. 368)	23.4.85	Idem	Idem	Serious disturbances of law and order representing a threat to the security of the State and the physical and moral integrity of the population and its property	Suspension of guarantees	Rights covered by arts. 5, 12, para. 2, 13, para. 2 and 24 of the Constitution: freedom to enter, reside in and leave the national territory, rights of detainees to be informed of the reasons for their detention and to be assisted by defence counsel; maximum administrative detention of 62 hours; inviolability of correspondence
Series of decrees	From 23.5.85	Every 30 days	Idem		Extension of state of emergency	Suspension of constitutional right to freedom of expression (art. 6, para. 1)
-	12.1.87			End of state of emergency (CCPR/C/SR.719)		
-	28.2.87			Expiry of Decree No. 50 of 24.2.84		
Legislative Decree No. 618	11.3.87			Criminal Procedure Act applicable in the event of suspension of constitutional guarantees		
Proclamation	12.11.89 12.12.89	12.12.89 12.1.90	Idem Idem			

REMARKS:

Due to the political and social crisis and the climate of general violence prevailing in El Salvador, the Government decreed, on 6 March 1980, the suspension of certain constitutional guarantees (including freedom of residence and movement, freedom of expression and freedom of correspondence). In 1982 and 1984 the restrictions on party political activity were temporarily lifted to permit elections to be held under normal conditions.

In a notification of 31 July 1985, the Government informed the United Nations Secretary-General of the successive extensions of martial law, effected every 30 days by legislative decree, in conformity with the Constitution of El Salvador, between 21 June 1984 and 11 July 1985.

The Government informed the Human Rights Committee at its 719th meeting (CCPR/C/SR.719) that the state of emergency had ended on 12 January 1987 and that persons who had committed crimes against the existence and organization of the State had been tried by military tribunals, in accordance with the procedure specified by Legislative Decree No. 50 of 24 February 1984 (whose application expired on 24 February 1985). See also the commentary of the OAS on this decree (E/CN.4/Sub.2/1987/Add.1, II), regulating attacks on the integrity and security of the State in the event of the suspension of constitutional guarantees.

The Constitution of El Salvador prescribes that unless the decree of suspension is explicitly renewed, constitutional guarantees are automatically restored (art. 29).

In a letter dated 18 August 1989, the Government informed the Special Rapporteur that during the suspension of freedom of expression, despite the legal powers granted by the state of emergency, the suspension was enforced with extreme moderation and tolerance by the authorities because of the democratic process taking place. No state of emergency has been declared from 12 January 1987 to the present. Notwithstanding this, by Legislative Decree No. 618 of 11 March 1987, the Criminal Procedures Act applicable on suspension of constitutional guarantees was passed, for application in future to proceedings conducted during emergency situations and also to cases pending, that were initiated under Decree No. 50 of 24 February 1984. The constitutional basis for this Act is article 30, which provides that when constitutional guarantees have been restored, the military tribunals shall continue to try any cases pending before them and that a special procedural law shall apply. Although it has full legal effect, this procedural law remains inoperative if there is no state of emergency, which is the fundamental prerequisite for its application.

Annex II

LIST OF REPLIES RECEIVED

A. Governments

Algeria	28 April	1989
Bolivia	27 December	"
Brunei Darussalam	21 March, 18 August	"
Burma (Union of Myanmar)	16 May, 17 August	"
	26 January	1990
Canada (Manitoba)	24 August, 18 September	1989
Chile	10 August	"
China	8 May, 15 August	"
Cuba	14 September	"
Cyprus	20 September	"
Czechoslovakia	21 November	"
El Salvador	18 August, 10 November	"
Fiji	6 November, 7 December	"
Finland	1 and 20 September	"
Haiti	16 March	"
Lebanon	28 August	"
Pakistan	24 October, 5 December	"
Peru	4 and 5 January, 7 March 2 and 10 August, 26 and 31 October, 10 and 29 November	"
	19 January	1990
Portugal	10 August	1989
Saudi Arabia	25 July	"
Senegal	15 January	1990
Singapore	18 August	1989
South Africa	6 July	"
Syrian Arab Republic	14 August	"
Tunisia	15 August	"
Venezuela	3 and 18 April	"
Yemen	15 July and 25 October	"
Yugoslavia	16 May, 15 June and 11 August	"

B. Competent United Nations bodies

Centre against Apartheid	31 August	1989
Office of the United Nations Disaster Relief Co-ordinator (UNDRO)	10 April	"
Office of the United Nations High Commissioner for Refugees	10 August	"
United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)	14 August	"

C. Other intergovernmental organizations

Directorate of Human Rights and Directorate of Legal Affairs (Council of Europe)	12 August	1989
Inter-American Commission on Human Rights (OAS)	31 July	"

D. Non-governmental organizations

1. NGOs in consultative status with the Economic and Social Council

Amnesty International	23 August	1989
International Association of Democratic Lawyers		"
International Commission of Jurists	14 March	"
International Confederation of Free Trade Unions (ICFTU)	25 August 5 October	"
International Defence and Aid Fund for Southern Africa	30 August	"
International Federation of Human Rights	December	"
International Federation of Journalists (IFJ)	25 September	"
International Fellowship of Reconciliation		"
International Human Rights Law Group		"
International Institute of Humanitarian Law	8 August	"
International Law Association	13 January	"
International League for Human Rights	28 November	"
International Union of Lawyers	4 August	1989
Inter-Parliamentary Union		"
Pax Romana	21 July	"
Regional Council on Human Rights in Asia	8 August	"

2. Other NGOs

Chilean Foundation for the Protection of Children Affected by States of Emergency (PIDEE)	17 May	"
Permanent Human Rights Assembly of Bolivia	16 November	"
Tibetan Refugee Communities and Tibet Support Groups in Europe	14 August	"

Annex III

LIST OF SPECIALIZED PUBLICATIONS RECEIVED

Amnesty International

- States of Emergency: torture and violations of the right to life under states of emergency. Amnesty International Publications SC/PG/CO/GR, London, July 1988, 32p.;

- Egypt: arbitrary detention and torture under emergency powers. Amnesty International Publications. ISBN: 0 86210. London. May 1989, 40p.;

- Peru: Human Rights in a state of emergency. AI Index: AMR 46/49/89, London, August 1989, 38p.;

- Rapport 1989. Les éditions francophones d'Amnesty International. Paris, 1989, 328p.

Association internationale des juristes démocrates

- Eléments d'information rapportés par la mission d'enquête effectuée dans les territoires occupés par Israël (1-11 June 1989). Bruxelles, 10p.

Bar-Yaacor, Nomi - Human rights in the West Bank and Gaza Strip, 1948-1989. Dissertation submitted to the Faculty of Law, University of Cambridge, Emmanuel College, United Kingdom, 59p.

Blanco, M.L. Ester - Violations of the prohibition of torture in emergency situations. Leyden Journal of International Law, Vol. II, No. 2, 1989, Faculty of Law, Leyden University.

Cardoso, Pedro Paulo - O sistema de emergência: dimensões jurídico-filosóficas e aspectos constitucionais brasileiros. Maio de 1989, 21p.

Chowdhury, Subrata Roy - The rule of law in a state of emergency. Pinter Publishers, London, July 1989, 288p.

Fédération internationale des droits de l'homme.

Rapport de mission. Israël et Territoires occupés. (2-8.789). Numéro hors série de la Lettre de la FIDH.

O'Donnell, Daniel - Protección internacional de los derechos humanos.

Comisión andina de juristas, capitulo 15 "Estados de excepción", pp. 395-414.

Ressler, E., Boothby, N., Steinbock, D. - Unaccompanied children. Care and protection in wars, natural disasters and refugee movements. Oxford University Press, Oxford, 1988.

Williams, Paul R. - Treatment of detainees. Examination of issues relevant to detention by the United Nations Human Rights Committee. Henry-Dunand Institute, draft copy, 1 June 1989, 136p.

Zovatto, Daniel G. - La protección internacional de los derechos humanos durante los estados de excepción en América Latina, 313p.